

#2017-99

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**IN THE STATE OF UTAH
STATE RECORDS COMMITTEE**

MINE SHAFT BREWING PC,	:	Appeal pursuant to
	:	UTAH CODE ANN. §63-2-304 and
a foreign limited liability company,	:	Application for Writ of Mandamus
Plaintiff,	:	
vs.	:	
SUMMIT COUNTY, a political	:	
subdivision of the State of Utah,	:	
Defendant.	:	

Plaintiff Mine Shaft Brewing, PC, a foreign limited liability company ("Mine Shaft ") hereby submits this Application for Writ of Mandamus pursuant to Rule 65B(d), UTAH R. CIV. P., seeking an order, mandating that Defendant Summit County (the "County") pay Mine Shaft's attorneys' fees and costs, and produce certain requested public documents and records in accordance with UTAH CODE ANN. §63-2-304, *et. seq.* ("GRAMA").

FACTS

1. Plaintiff, Mine Shaft, is a foreign limited liability company which, since 2014, has actively sought to develop a craft brewery laboratory (the "Project") at the Park City Tech Center (the "Center").

2. Defendant, the County is a political subdivision of the State of Utah.

3. Operations at the Center are governed by the Development Agreement for Summit Research Park, dated December 10, 2008, as adopted by Summit County Ordinance No. 698, entered December 11, 2008 (the "Development Agreement"). *See Exhibit "A".*

4. In connection with the Development Agreement, a process for obtaining preliminary determination of Approved Uses at the Center was set out in the Amendment to the Development Agreement dated May 15, 2014 at Section 4.14 (the "Amendment"). *See Exhibit "B".*

5. On August 18, 2014 Mine Shaft first submitted its application (the "Application") seeking a determination of Approved Use for its Project pursuant to the procedure set out in the Amendment. *See Exhibit "C".*

6. In response to its Application, Mine Shaft received notice on October 9, 2014 from Robert Jasper, Summit County Manager which listed the apparent reasons for the deciding that Mine Shaft's project was somehow not a permitted use (the "Denial letter"). *See Exhibit "D".* Among the supposed findings in the Denial Letter was the determination, not based upon any factual evidence but rather the "belief" of certain persons, that "the primary function of the brewery is the manufacture of a product for distribution and sale."). Ex. D at Par. 1. This finding ignores the research, technology and science that creates the "product." The Denial Letter also wrongly decides that the proposed restaurant was not an "incidental commercial use" on the basis that "only a handful of existing uses" were in place at the Center at the time of the Application. Ex. D at Par. 2. This statement belies the future of the Center, since at the time of the Application, much of the Center was subject to continuing and ongoing development.

7. In addition to containing erroneous and factually insufficient findings, the Denial Letter was not issued until October 9, 2014, well outside the 30-day deadline for a decision on an Approved Use determination application under Section 4.14.2 of the Amendment. Specifically, that section states that “[n]ot later than **thirty (30) days** after the submission of the Application, the County Manager **shall** make a determination as to whether the proposed use us an Approved Use” Ex. B. (emphasis added).

8. Even though the Denial Letter was untimely, in good faith Mine Shaft sought a timely appeal through section 4.14.3 of the Amendment (the “Appeal”). See Exhibit “E”.

9. Soon after requesting its Appeal in October, 2014, it became apparent to Mine Shaft that there must be some sort of hidden agenda at work. See for example the October 28, 2014 email exchange between Robert Jasper and Tim Nemeckay (*see* Exhibit “F”). Specifically, Mr. Nemeckay informed Mr. Jasper, a Summit County official, that “[t]he copy editor / reporter has confirmed that he has been in communication with two individuals in planning and receiving information from them *before it is even public or on the calendar .*” (emphasis added). Before the very important Appeal hearing on the Mine Shaft project, Summit County officials were clearly having inappropriate off the record conversations with members of the local press.

10. Therefore, in order to preserve its rights and protect its Project and the integrity of its Appeal, Mine Shaft advised the County in November 2014 that although its Appeal was timely filed, it would reserve its right to move forward with a hearing, by mutual agreement, at a later date. Notably Mine Shaft did not withdraw its Appeal and the County agreed to an indefinite appeal hearing. See Exhibit “G”.

11. After postponing its Appeal, Mine Shaft submitted additional information and was involved with repeated discussions and correspondence with the County.

12. As a result of Mine Shaft's efforts, a new hearing date for its Appeal was set for September 28, 2016. See Exhibit H.

13. The agenda for the September 28, 2016 meeting, where the Appeal was to be heard, was issued on September 23, 2016. Mine Shaft's Appeal was absent from the agenda. See Exhibit I.

14. Shockingly, the County asked a representative of the developer to send a notice requesting removal of Mine Shaft's Appeal from the September 23, 2016 agenda **after** the agenda had already been issued (without Mine Shaft's Appeal as an agenda item). See Exhibit J.

15. On September 28, 2016, Mine Shaft attended the Council meeting despite the removal of its Appeal from the agenda and spoke during the public comment period. See transcript of the hearing, attached as Exhibit K. At this meeting, Mr. Thomas stated that: "My understanding is communicated to Pat Putt, the community development director, that they were not prepared to go forward. That's--that's the only reason [Mine Shaft was not on the agenda]. Ex. K. pg. 15. Mr. Putt never communicated this information to Mine Shaft or its counsel. Mr. Thomas further indicated that it was his understanding that the appeal wasn't cancelled, only postponed. Ex. K, pg. 16. Mr. Thomas went on to discuss conversations that may have been had between Mr. Putt and but again were never disclosed to Mine Shaft or its counsel. Ex. K. pgs. 16-19.

16. On September 23, 2016, in order to better understand the unusual forces at work in regard to the Appeal, Mine Shaft submitted a request for documents pursuant to UTAH CODE

ANN. § 63G-2-204 to the County which sought: "all documents from the Administration/County Manager department, the County Council, the County Clerk, the Building department, Planning and Zoning, the Snyderville Basin Planning Commission, the Economic Development department, the Health Department, specifically related to food trucks, and/or the Fire Warden related in any way to the Park City Brewery project, currently located at 2720 Rasmussen Rd., Ste A1, Park City, Utah 84098, from January 2014 through today. All documents includes but is not limited to text messages (including on personal mobile phones, if applicable), phone records (including office, mobile or home phones, if applicable), e-mails (including the use of personal e-mail accounts, if applicable), plans (including plans to expand the existing footprint, expand to another physical location or move to another location altogether), permits, inspections, meeting minutes and agendas, and approvals" (the "GRAMA Request 1").

17. After the unusual Council meeting on September, 28, 2016, Mine Shaft made an additional request for records under GRAMA on September 29, 2016. In this request, Mine Shaft sought: all documents from the Administration/County Manager/executive department and the Planning Commission (the "County"), related in any way to the Park City Tech Center ("Tech Center"), from June 2014 through today. All documents includes but is not limited to text messages (including on personal mobile phones, if applicable), social media messages (including on personal mobile phones, if applicable), phone records (including office, mobile or home phones, if applicable), e-mails (including the use of personal e-mail accounts, if applicable), meeting minutes or records (including informal meetings). All records related in any way also includes any communication between the County on the one hand, and the Tech Center on the

other hand, including any agents of the Boyer Company, or any agents of
' ("GRAMA Request 2").

18. In connection with the development of the Center, a "Blue Ribbon Commission" was formed. Since Mine Shaft's counsel and Summit County's counsel could not agree that the either GRAMA Request 1 or GRAMA Request 2 encompassed documents related to this Blue Ribbon Commission, Mine Shaft filed an additional GRAMA request on June 26, 2017, seeking: "all documents from the Administration/County Manager department, the County Council, the County Clerk, the Building department, Planning and Zoning, the Snyderville Basin Planning Commission, and/or the Economic Development department, related in any way to the Blue Ribbon Commission which was officially created in April, and last met on Friday, June 23, 2016, and has been conducting meetings since October, 2016. All documents includes but is not limited to work sessions, minutes, meeting recordings [sic], surveys for the members and responses to the surveys, e-mails, v-mails, text messages, instant messages, social media posts, Word® or Word Perfect® documents, Adobe® documents, spreadsheets, PowerPoint® presentations, databases, telephone logs, audio recordings, videos, photographs or images, information contained on desktops, laptops, tablet computers, smartphones or other portable devices, and/or calendar records. This request is made for records from September 1, 2016 through today, June 26, 2017" (the "GRAMA Request Blue Ribbon Commission").

19. After requesting an extension of time to respond to the GRAMA Request Blue Ribbon Commission, the County provided a response on July 17, 2017, claiming that all responsive documents were provided to Mine Shaft.

20. Contrary to the County's claims, all documents responsive to the GRAMA Request Blue Ribbon Commission were not provided, particularly agendas, meeting minutes and recordings, and all of the draft maps and drawings and plans being utilized in the Commission's work. In fact, Mine Shaft's review of the produced documents that makes clear that the County withheld many documents, since the produced documents refer to other documents that were not included in the GRAMA Request Blue Ribbon Commission production. Specifically, the following documents were intentionally not produced:

- a. Emails, phone records, texts coordinating and referring to the "first" meeting of the Commission on October 10th 2016;
- b. Minutes of October 10th 2016 meeting;
- c. Recording of October 10th 2016 meeting;
- d. Calendar Invites for the October 10th 2016 meeting;
- e. E-mails from (for example, responded to an e-mail from on Thursday February 2, 2017, but initial email was not produced);
- f. Calendar Invite 11-18-2016: the invite from and was not produced;
- g. Agendas and publically posted notices of KJNMPC meetings;
- h. The draft Confidentiality Agreement requested by at the October 10th 2016 meeting;

i. E-mails, texts, and phone records from

referenced in the October

10, 2016 meeting;

j. E-mails, texts, phone records from Patt Putt with prior to the e-mail dated November 3, 2016 that references prior meetings: "I think we are behind the 8 ball on showing our commitment to an expedited process". specifically references the October 10, 2016 meeting at the Richins building, demonstrating that records prior to October 10, 2016 must exist.

21. Due to the County's failure to comply with the GRAMA Request Blue Ribbon Commission in violation of the requirements of UTAH CODE ANN. § 63G-2-204, et seq., Mine Shaft appealed the County's response on August 10, 2017 (the "GRAMA Appeal"). See Exhibit L.

22. On August 24, 2017, on the eve of the GRAMA Appeal hearing, the County sent further clarification of its response to the GRAMA Request Blue Ribbon Commission. While the County tried to provide cover for Mine Shaft's claims as set out in Paragraph 19 of the GRAMA Appeal, the County completely ignored the claim set out in Paragraph 18 of the GRAMA Appeal. See Exhibit M.

23. Mine Shaft's GRAMA Appeal was heard on August 25, 2017. A transcript of that hearing, in which no representative County chose to speak or introduce evidence in support of its burden to provide its compliance with UTAH CODE ANN. § 63G-2-204, et seq., is attached hereto as Exhibit N.

24. The County Manager, issued his decision on ~~August 25, 2017~~ ^{CAD decision} (the same date as the hearing) (the "Decision"). See Exhibit O.

25. The Decision makes purported findings of fact based on evidence that is not in the record through either produced documents or oral testimony. For example, at Paragraph 3 of the Decision, the County Manager finds that "Summit County complies with the State Archive Retention Schedules." No evidence was submitted by the County to demonstrate that it is compliance with such schedules.

26. Despite the lack of any evidence from the County, the Decision finds at Paragraph 4 that "...the County has produced all records within its possession" responsive to the GRAMA Request Blue Ribbon Commission. Mine Shaft is unaware of any independent investigation by the County Manager that could have led to such a conclusion, and the County provided no evidence or testimony that would support such a conclusion.

27. At Paragraph 5 of the Decision, the County Manager found that Mine Shaft had not proven that an October 10, 2016 meeting had occurred, at that "mere speculation and conjecture" could not support this claim. This so-called "Conclusion of Law" misses the fact that the County has possession of documents, and that in fact Mine Shaft provided the County with a recording of the meeting, so its obvious that the County is intentionally withholding document. Rather than produce the documentary evidence (which it cannot produce since those documents were wrongfully withheld), Mine Shaft demonstrated the "evidence of absence", evidence that suggests that something that should exist (documents that necessarily must exist given the language contained in the documents that were produced) is missing.

28. Based on the erroneous findings of fact, the County Manager denied Mine Shaft's Appeal.

29. The Decision is arbitrary, capricious and not based on facts or evidence. The absence of documents that should exist, based on a review of the documents that were produced, has been made clear by Mine Shaft.

30. Mine Shaft is entitled to the public documents that the County has wrongfully withheld.

31. The County has a statutory legal obligation to produce the public documents and records sought by Mine Shaft.

32. Based on the County's conduct and the County Manager's wrongful denial of the Appeal, Mine Shaft seeks a mandate from this Court requiring the County to pay Mine Shaft's attorneys' fees and costs and to produce, pursuant to GRAMA, the requested public documents and records that the County has wrongfully withheld.

33. Mine Shaft seeks a mandate from this court ordering the County to meet its statutory obligations and produce the requested public documents and records. In order to obtain the relief sought under UTAH R. CIV. P. 65B(d), Mine Shaft must meet two requirements: (1) "a clear legal right to the performance of the act demanded," and (2) "a plain duty of the officer, board, or other tribunal to perform as demanded." *Garcia v. Jones*, 29 Utah 2d 409, 510 P.2d 1099, 1100 (Utah 1973) (internal quotation marks omitted). "To determine whether to grant relief, a court must look to the nature of the relief sought, the circumstances alleged in the petition, and the purpose of the type of writ sought." *Hogs R Us v. Town of Fairfield*, 2009 UT 21 *, 207 P.3d 1221, 2009 Utah LEXIS 59 (Utah 2009) (internal citations omitted).

34. Since the facts presented by Mine Shaft clearly satisfy the requirements needed, its application seeking a Writ of Mandamus should be granted.

I. Mine Shaft Has a Clear Legal Right to the Production it Seeks

35. Mine Shaft is entitled to and has a clear legal right to the public records that the County has wrongfully withheld. Pursuant to UTAH CODE ANN. §63G-2-201, “[e]very person has the right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours, subject to §§63G-2-203 and 63G-2-204.”

36. Mine Shaft is a “person” under UTAH CODE ANN. §63G-2-201 and therefore has a legal right to the public records it has requested. *See* UTAH CODE ANN. §63G-2-103(17) (“Person” means: (a) an individual; (b) a nonprofit or profit corporation; (c) a partnership; (d) a sole proprietorship; (e) other type of business organization; or (f) any combination acting in concert with one another.)

37. The documents and records sought by Mine Shaft from the County are public records. *See* UTAH CODE ANN. §63G-2-103(21) (“Public record” means a record that is not private, controlled, or protected and that is not exempt from disclosure as provided in §63G-2-201(3)(b).)

38. UTAH CODE ANN. §63G-2-201(3)(b)(3) indicates that the following types are records are not public and not subject to disclosure:

(a) a record that is private, controlled, or protected under §§63G-2-302, 63G-2-303, 63G-2-304, and 63G-2-305; and

(b) a record to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or

restricted as a condition of participation in a state or federal program or for receiving state or federal funds.

39. The County has not asserted that the wrongfully withheld responsive documents are not public records. Since these documents not protected under §§63G-2-302, 63G-2-303, 63G-2-304, and 63G-2-305, and are not otherwise restricted under §63G-2-201(3)(b)(3)(b), the County, the County must produce them. The County has no legally recognizable basis for withholding the requested public documents and records from Mine Shaft.

II. The County Has a Plain Duty to Perform Under GRAMA

40. Under GRAMA, the County is obligated to produce public documents. Specifically, the purpose of GRAMA is to ensure "... 'the public's right of access to information concerning the conduct of the public's business.' UTAH CODE ANN. §63G-2-102(1)(a). It accomplishes this by protecting '[e]very person['s] . . . right to inspect a public record free of charge, and the right to take a copy of a public record during normal working hours.' *Id.* §63G-2-201(1)." *Maese v. Davis County*, 2012 UT App 48, P4, 273 P.3d 949, 950, 2012 Utah App. LEXIS 57, *3, 702 Utah Adv. Rep. 27, 2012 WL 592733 (Utah Ct. App. 2012). "The Legislature's commitment to governmental transparency is reflected in GRAMA's declaration that '[a] record is public unless otherwise expressly provided by statute.' ... Moreover, although GRAMA contains a lengthy roster of records that are presumptively public, ... the statute cautions that this list 'is not exhaustive and should not be used to limit access to records,'" *Deseret News Publ. Co. v. Salt Lake County*, *supra*.

41. Despite the Legislature's directive and the public policy of this state, the County has intentionally and wrongfully refused to provide the records to which Mine Shaft is entitled

and it has offered no explanation and no appropriate reason under GRAMA, or any reason for that matter, for failing to provide the documents and records that Mine Shaft has demanded.

42. Mine Shaft is not asking the court to require to the County to do anything more than what the County is statutorily required to do. Mine Shaft has clearly established all the elements required for this court issue a mandate and therefore, asks the Court to grant its Writ of Mandamus. The County must be required to produce the documents responsive to the GRAMA Request Blue Ribbon Commission that it has wrongfully withheld.

PRAYER FOR RELIEF

Mine Shaft prays for relief and demands judgment against the County as follows:

- A. An order of this court directing the County to comply with GRAMA Request Blue Ribbon Commission;
 - B. An award of Mine Shaft's attorney's fees and costs;
 - C. Such other relief, equitable or otherwise, necessary to give effect to the foregoing;
- and
- D. For such other and further legal and equitable relief as the Court deems appropriate.

DATED this 22nd day of September, 2017.

CARMAN LEHNHOF ISRAELSEN LLP

/s/ Dallis Nordstrom Rohde

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CERTIFICATE OF SERVICE

On September 22, 2017, I transmitted this appeal and referenced documents to:

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